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ALMOST inevitably on the first day of law school, a professor will ask a student how a court should have decided a particular matter. The student will respond by proposing a result or rule. The professor then points out all of the undesirable consequences which might follow upon adoption of the student's proposal. The professor has just made a classic "parade of horribles," or bad consequences argument. It is not surprising that law students meet this argument at the very outset of their legal education since it is a main stay of legal argumentation, as well it should be. When faced with a decision, if one alternative is likely to lead to bad results, a rational person would presumably hesitate before choosing that course of action. Thus, the bad consequences argument tends to have logical and intuitive appeal. Moreover, it is an easy argument to make. Decisions, especially legal decisions, generally do have consequences, and it will usually be difficult to determine exactly what they will be with any certainty. The future, by definition, is uncertain. And yet, it only takes a modicum of imagination to speculate about what very well might happen. The argument of bad consequences can be a powerful tool in the hands of the advocate because it tends to place the opponent in the uncomfortable position of attempting to refute the speculative state of affairs that presently exists only in the advocate's imagination.

Given the appeal of this argument, it is hardly surprising that it has been employed with great frequency by the Supreme Court of the United States from the earliest days and continues to play a significant role in contemporary constitutional interpretation. It has been utilized by the Court in many of its most memorable decisions including: *Marbury v. Madison*,[1] *McCulloch v. Maryland*,[2] *Lochner v. New York*,[3] *Youngstown Steel & Tube Co. v. Sawyer*,[4] *New York Times Co. v. Sullivan*,[5] *Mapp v.*

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1. 5 U.S. 137, 178 (1803).
2. 17 U.S. 316, 426 (1819).
3. 198 U.S. 45, 59-64 (1906).
4. 343 U.S. 579, 635, 636, 651-53 (1952) (Jackson, J., concurring).
5. 376 U.S. 254, 267, 279, 292 (1964).

Ohio,[6] *Griswold v. Connecticut*,[7] *Miranda v. Arizona*,[8] *United States v. Nixon*,[9] *Bakke v. Regents of the University of California*,[10] just to mention a few. Although bad consequences is an easy argument to make and a frequent argument made, it is not always a convincing argument. Nor is it necessarily a bad argument. To a large extent, it depends on the advocate's ability to persuade the reader that bad things are, in fact, likely to occur if a particular course of action is followed. There are a number of obvious responses, including: there is no reason to believe that these bad consequences will actually happen, the bad consequences might occur but can be prevented, the consequences are really not that bad after all, or if the bad consequences occur, we simply must suffer them in order to achieve other important ends. Each of these responses can be found in the case law. It should also be noted that there are two somewhat different types of bad consequences—those over which the courts will have some control and those over which they won't. Often the argument is made that a particular rule or result is undesirable because it will prove unworkable, confusing, or easily abused. Presumably, these consequences may be avoided or tempered somewhat through further judicial supervision. On the other hand, when the bad consequences will result from the independent conduct of third parties in response to the judicial ruling, the courts may have less ability to contain the damage.

This article will examine several aspects of the bad consequences argument. First, it will briefly consider instances in which the bad consequences argument is employed as a means of bolstering some other form of constitutional argument. Next, it will examine the use of the bad consequences argument as a rhetorical device. Then it will consider the issue of whether there needs to be some showing that bad consequences will actually occur. Next, it will discuss cases in which the bad consequences in question are legal rules or doctrines which the Court itself has some ability to avoid. Finally, it will discuss constitutional boundary disputes in which the bad consequences argument has become something of a structural principle.

BAD CONSEQUENCES AND OTHER INTERPRETIVE METHODOLOGIES

The bad consequences argument is often used as a method of bolstering some other type of accepted constitutional argument. For instance in *McCulloch v. Maryland*,[11] Chief Justice Marshall employed bad consequences to aid his textual argument of defining the word "necessary" broadly in the Necessary and Proper Clause to mean "appropriate," rather than narrowly to mean "essential," by contending that the nar-

6. 367 U.S. 643, 654, 660 (1961).
7. 381 U.S. 479, 484-85 (1965).
8. 384 U.S. 486, 483 (1966), *id.* at 516 (Harlan,, J., dissenting), *id.* at 542 (White, J. dissenting).
9. 418 U.S. 683, 713 (1974).
10. 438 U.S. 265, 309 (1978).
11. 17 U.S. 316 (1819).

rower reading would lead to the undesirable result of precluding Congress from addressing unforeseen exigencies,[12] although it is not altogether clear why such consequences would follow. Bad consequences are often raised in support of doctrinal arguments. For instance, in *Zorach v. Clausen*, Justice Douglas made a classic bad consequences argument in support of the doctrinal position that separation of church and state can't possibly mean complete separation since

> Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls, the appeals to the Almighty in the messages of the Chief Executive; the proclamation making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths–these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment.[13]

Another standard use to which the bad consequences argument can be put is to emphasize that it is important not to be blinded by the seemingly insignificant impact of the facts before the Court, but to remain aware that the principle will apply to harms of a greater magnitude as well. For instance, in *Crandall v. Nevada*,[14] the Court invalidated a tax of one dollar on every person leaving the state by vehicle for hire. In the process, it pointed out, however, that the potential harm was hardly limited to one dollar per head since "if the state can tax a railroad passenger one dollar, it can tax him one thousand dollars. . . [i]f one state can do this, so can every other state."[15]

BAD CONSEQUENCES AS RHETORICAL ARGUMENT

Occasionally, the bad consequences argument is presented almost as a matter of rhetorical overkill. If the Court reaches a particular result, all hell will break loose. The famous nineteenth-century political question doctrine case of *Luther v. Borden*[16] presents a well-known example of an assertion of "really" bad consequences. The issue there was whether the Court should determine which of two competing groups was, in fact, the legitimate government of Rhode Island. As Chief Justice Taney put it: if the existing charter government should be deemed to have been illegitimate

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12. *Id.* at 415.

13. 343 U.S. 306, 312-13 (1952). Strangely enough, Justice Douglas seemed to believe he was supporting a textual argument having proclaimed that the First Amendment "studiously defines the manner, the specific ways in which there shall be no concert or union or dependency" between the church and the state. *Id.* at 312. Of course the First Amendment itself does no such thing. The law of freedom of religion would presumably be considerably clearer and less complicated if it did. Justice Douglas must have meant that the Court's First Amendment doctrine does this.

14. 73 U.S. 35, (1867).

15. *Id.* at 46.

16. 48 U.S 1 (1849).

> then the laws passed by its legislatures during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgements and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.[17]

This is essentially a prudential or institutional argument. The Court is saying that, even if it could decide between these two governments, it shouldn't because that would lead to very dire consequences. In the context of the entire case, the argument may well be something of a makeweight since there were other considerations prompting the Court's decision which it seemed to consider more significant. The bad consequences argument in *Luther* certainly gets the reader's attention, but it readily appears to be little more than rhetorical hyperbole.

Obviously, one could ask why an invalidation of the existing government, whether by the Court, the President, or Congress must inevitably throw Rhode Island into a retroactive state of anarchy. That would seem to be a state of affairs to be avoided if at all possible. Why couldn't the Court simply declare that, as of now, the charter government is illegitimate? However, to avoid chaos, its authorized actions up to this time will be accepted. In other words, the obvious response to catastrophic consequences can be that they simply don't have to happen, even if the Court takes the course of action in question.

The foundational case of *Marbury v. Madison* provides another noted example of rhetorical overstatement of potential adverse consequences. In justifying judicial review of Congressional legislation, Chief Justice Marshall relied heavily on the fact that we have a written constitution intended to define and limit governmental power.[18] Near the end of his opinion, he argued that the absence of judicial review "would subvert the very foundation of all written constitutions . . . [and would] reduce what we have deemed the greatest improvement on political institutions to nothing—a written constitution.[19]" Marshall had a point, but with his characteristic vigor, he took it too far. Judicial review does provide a significant—probably the most significant—method of enforcing constitutional limitations. However, it is by no means the only method, as Marshall would have us believe. Marshall was not challenged on this point since the decision was unanimous; however, scholars have since observed that constitutional limitations can indeed be enforced through the political process itself, as is done in many countries which have written constitutions but do not have judicial review of actions by coordinate branches

17. *Id.* at 38-39. The Court made a similar argument in *Cooley v. Board of Wardens*, 53 U.S. 299, 321 (1851), when it observed that if the local pilotage law in question violated the Commerce Clause, then sixty years of illegally collected fees would need to be repaid.

18. 5 U.S. 137, 175 (1803).

19. *Id.* at 178.

of government.[20]

The more recent landmark case of *Griswold v. Connecticut*[21] provides yet another example of dire speculation about bad consequences obviously offered up for rhetorical effect rather than logical persuasion. In the course of invalidating the criminal conviction of a birth control clinic director as an aider and abettor for dispensing contraceptives to a married couple in violation of a law banning the use of such contraceptives, Justice Douglas conjured up the spectacle of a "police search [of] the sacred precincts of the marital bedrooms for tell tale signs of the use of contraceptives."[22] In dissent, Justice Stewart pointed out that there had not been, nor would there likely be, any realistic threat of such a "bedroom search."[23] But that, of course, was quite beside the point. Justice Douglas knew that as well. He was obviously using this rather extreme hypothetical to attempt to tie his theory back to the marital couple, the primary subject of the legislation, as well as to finish up with a rhetorical flourish.

There are instances, however, where a justice acknowledges that the consequences of a decision or rule will not be catastrophic but should nevertheless be avoided. As Justice Jackson put it in *Youngstown Steel & Tube Co. v. Sawyer*, permitting the President to seize and operate the steel mills during war time would not "plunge us straight away into dictatorship, but it is a step in the wrong direction."[24] Likewise in *Boyd v. United States*, the Court recognized that, though a subpoena for private papers is "divested of many of the aggravating circumstances of actual search and seizure . . ., illegitimate and unconstitutional practices get their first footing. . . by silent approaches and slight deviations from legal modes of procedure."[25] If anything, the modesty of these observations is far more persuasive than the more catastrophic predictions which the Court sometimes makes.

WILL THE BAD CONSEQUENCES ACTUALLY OCCUR?

The bad consequences argument is persuasive only to the extent that the likelihood of occurrence seems realistic. It is generally easy enough to argue that any course of action will lead to unfortunate results, but how do we know that these things will actually come to pass? To what extent should it be the obligation of the proponent of such an argument to provide some support for the dire predictions? It is not unusual for the Court to speculate about the impact of its decision and yet make no effort whatsoever to provide any empirical grounding for its predictions. In recognizing a qualified presidential communications privilege in *United States v. Nixon*, the unanimous Court opined that

20. *See* William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1, 17.
21. 381 U.S. 479 (1965).
22. *Id.* at 485.
23. *Id.* at 525.
24. 343 U.S. 579, 651 (1952) (Jackson, J., concurring).
25. 116 U.S. 616, 635 (1886).

> allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. . . . The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminary shown to have some bearing on the pending criminal cases.[26]

The Court offered no factual basis for this conclusion. Intuitively, one might believe that the Court had it backwards—that there was likely to be a sizeable chill on communications and very little law enforcement need. *Nixon* was a strange case decided under political and deadline pressure, so perhaps the Court's bald assertions may be understood if not excused. Still, it provides a sterling example of a tendency of the Court to offer up the bad consequences argument on faith alone. Since *Nixon* was unanimous there was no one to raise these questions in dissent. Usually there is, however. For instance, in *Gertz v. Robert Welch, Inc.*,[27] the majority significantly altered the common law of libel in an attempt to better accommodate protection of reputation with freedom of speech. The Court's doctrinal superstructure was challenged from opposite ends of the spectrum on the ground that it was based on unsupported hunch and speculation. Writing for the Court, Justice Powell purported to be designing a set of rules that would avoid the bad consequences of either over or under protecting reputation, but the dissenters had their doubts. Justice Brennan charged that Justice Powell's argument that public figures could protect themselves by responding through the media was an "unproved and highly speculative generalization . . . ."[28] Unlike Justice Brennan, who believed that Justice Powell's compromises cut too deeply into first amendment values, Justice White contended that it eviscerated the interest in reputation. Justice White faulted Justice Powell for providing "no hard facts" to support his thesis that private citizen libel litigation would result in a chilling effect on the truth.[29] It is still a matter of debate as to who is correct on these questions; however, Justices Brennan and White were surely right in pointing out that Justice Powell's elaborate doctrinal superstructure does indeed seem to be based on unsupported guesses as to how private citizens and the press will behave.

Yet another response to a bad consequences argument is not to merely ask "where's the evidence" but to attempt to set forth evidence to the contrary. The famous case of *Miranda v. Arizona*[30] provides an example. The opponents of the Court's *Miranda* warnings, including the dissenters, charged that the rules would impair the ability of the police to obtain confessions which are necessary to solve crime[31] and would return mur-

26. 418 U.S. 683, 712-13 (1974).
27. 418 U.S. 323 (1974).
28. *Id.* at 361, 363 (Brennan, J., dissenting).
29. *Id.* at 368, 390 (White, J., dissenting).
30. 384 U.S. 436 (1966).
31. *Id.* at 516 (Harlan, J., dissenting).

derers and rapists to the street.[32] These would indeed be bad consequences if they were to occur and very well might result in a reduction in the public's esteem for the Court. But the Court was not without a defense to this argument. It was able to point out that both the FBI and English police had delivered similar warnings for quite some time with little apparent trouble.[33] That is not to say that these examples might not be distinguishable from the state systems to which *Miranda* would apply; however, as a practical matter, the burden of persuasion had been thrown back to the critics.

BAD DOCTRINAL CONSEQUENCES

When the Court is contemplating the prospect that a rule or decision will lead third parties to engage in conduct which may result in bad consequences, it may have to acknowledge that once it sets the process in motion, there will be little that it can do to stop the harm from occurring. However, where there is concern that a decision or legal rule will cause future courts to issue decisions or build on the rule in a manner that would be harmful, the Court must consider whether it will be able to tailor the rule to avoid this harm. Will there be confusion or can stability be established? Can a sensible line be drawn or will it be arbitrary? Will there be a slippery slope or will there be footholds?

Many of the bad consequences arguments in the Supreme Court revolve around these questions. One common variant of the bad consequences argument attempts to defeat a particular legal approach by asserting that it will result in a series of incorrect legal decisions in the future which the courts themselves will be incapable of avoiding. For instance, in *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge,*[34] the Court declined to read a covenant not to issue a competing charter into the charter previously issued to the owner of a bridge on the grounds that it would undermine the development of roads and bridges in an expanding economy, and that the Court would be hard-pressed to alleviate the problem since it would require the creation of an arbitrary set of rules as to what is and isn't permissible.[35]

Chief Justice Marshall's famous thesis in *McCulloch v. Maryland* that the power to tax is the power to destroy, which led him to conclude that a state may not impose a specific tax on a federal instrumentality,[36] is a similar argument. To illustrate, Marshall noted that, if permitted, "they may tax the mail; they may tax the mint; they may tax patent-rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all means employed by the government, to an excess which

32. *Id.* at 542 (White, J., dissenting)
33. *Id.* at 483.
34. 36 U.S. 420 (1837).
35. *Id.* at 552.
36. 17 U.S. 316, 426 (1819).

would defeat all ends of government."[37] A classic parade of horribles indeed! A century later, however, in response to the argument that the power to tax is the power to destroy, Justice Holmes succinctly responded "not while this Court sits."[38] In other words, if we make the mess, we can clean it up. In answer to the argument that recognition of a particular rule or power might be abused, the Court or individual justices have often responded as Justice Story did in *Martin v. Hunter's Lessee* that " it is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse."[39] The general point is valid, but Justice Story goes too far. The argument for potential abuse is not "always" a bad argument. Sometimes it is a good argument. Some powers are more likely to be abused than others. Some rules are more likely to prove arbitrary or create confusion or to inevitably lead to undesirable results than others. The key is to determine when the bad consequences or abuse argument is sensible and when it is not. To return again to Justice Holmes "where to draw the line . . . [i]s the question in pretty much everything worth arguing in the law."[40]

However, *Plessy v. Ferguson*[41] should caution us against automatically assuming that courts will necessarily come to the rescue and protect us against bad consequences should they materialize. In upholding a Louisiana law requiring separate railroad cars for blacks and whites, the Court went out of its way to reject the arguments set forth by "learned counsel for the plaintiff" to the effect that the decision would authorize the state to "enact laws requiring colored people to walk upon one side of the street and white people on the other side of the street, or requiring white men's houses to be painted white and colored men's black . . . [since] the reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[42] Sixty years of hard core segregation constructed on the edifice of *Plessy* demonstrates the insight of "learned counsel for the plaintiffs" and the woeful inadequacy of the Court's reliance on the reasonableness principle, an error which Justice Harlan clearly recognized in dissent.[43]

Employment Division v. Smith,[44] a highly controversial case in the area of Free Exercise of Religion, is a contemporary example of judicial fear of an inability to draw defensible lines. Writing for the majority, Justice Scalia construed the Free Exercise Clause to stand for the principle that

37. *Id.* at 432.
38. Panhandle Oil Co. v. Mississippi ex. rel. Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).
39. 14 U.S. 304, 344 (1816). *See also* Worcester v. Georgia, 31 U.S. 515, 561, 572 (1832) (McClean, J., dissenting).
40. Irwin v. Gavit, 268 U.S. 161, 168 (1925).
41. 163 U.S. 537 (1896).
42. *Id.* at 549.
43. *Id.* at 550, 557 (Harlan, J., dissenting).
44. 494 U.S. 872 (1989).

neutral and general laws which simply burdened the exercise of religion do not violate the Free Exercise Clause.[45] In settling on that principle, Justice Scalia relied on the bad consequences argument raised in *Reynolds v. United States*,[46] the Court's first Free Exercise case. The Court decided that absent such a rule of neutrality, every person would become a law unto themselves, resulting in anarchy.[47] Justice Scalia believed that the Court couldn't alleviate the problem through future line drawing because it would be inappropriate, if not impossible, for the Court to attempt to determine whether a particular practice was central to a religious faith.[48] Concurring in the result but not the opinion, Justice O'Connor objected to Justice Scalia's neutrality approach with her own bad consequences argument: that it was an undesirable rule because it would unduly restrict the Free Exercise Clause to providing protection against only the fairly unusual law that specifically targets religious practices.[49] In dissent, Justice Blackmun argued that it was improper to adopt a rule simply because a preferable alternative might be subject to abuse, an argument which he noted could always be raised.[50] Frequently, the bad consequences argument is window-dressing. *Smith*, however, is an important case in which it appears that it played a significant role. Justice Scalia's fear that alternatives would either create chaos or force the Court into an institutionally inappropriate position would seem to be the primary rationale behind his approach. In rejecting Justice O'Connor's and Justice Blackmun's alternative approaches, Justice Scalia and the majority essentially decided that our bad consequences are worse than yours.

Washington v. Davis[51] would seem to be another case in which the prospect of bad consequences influenced the decision. There, the Court concluded that, under the Equal Protection Clause, a plaintiff must show discriminatory intent rather than simply adverse impact in order to establish an Equal Protection violation based on race.[52] Although the Court relied on arguments of precedent, doctrine, and principle, looming over the decision was it's conclusion that an impact standard "would raise seri-

45. *Id.* at 877-79.

46. 98 U.S. 145 (1878). There the Court opined that if the Free Exercise Clause protected polygamy, the state would be able to prohibit human sacrifice as part of religious worship or a wife from throwing herself onto her husband's funeral pyre. *Id.* at 166. This is certainly one of the Court's more memorable parades of horribles and yet both of these examples refer to actual religious practices.

47. *Id.* at 888.

48. *Id.* at 887. Justice Scalia believed that Justice Blackmun essentially favored such an approach through his focus on the impact of the practice. *Id.* at n.4.

49. *Id.* at 893.

50. *Id.* at 916-17. In *Lee v. Weisman*, 505 U.S. 577 (1992), a recent Establishment Clause Case, Justices Souter concurring and Scalia dissenting engaged in dueling battle of bad doctrinal consequences. Justice Souter charged that Justice Scalia's non-preferentialist approach would require the Court to engage in comparative theology to evaluate prayers, *id.* at 616, while Justice Scalia responded that Justice Souter's separationist approach would outlaw many well-accepted practices such as placing the phrase "In God We Trust" on coins, *id.* at 639.

51. 426 U.S. 229 (1976).

52. *Id.* at 240.

ous questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black man than to the more affluent white. Given that rule such consequences would perhaps be likely to follow."[53] That was obviously a risk that the Court was unwilling to take. It was not convinced that it might be avoided by drawing distinctions on a case-by-case basis or through the employment of procedural devices such as presumptions and the shifting burdens of proof.

Bolling v. Sharpe,[54] a companion case to *Brown v. Board of Education*,[55] is yet another case in which the risk of bad consequences, to some extent to the Court itself, may have been quite important to the decision. In *Bolling*, the Court found for the first time in the Fifth Amendment Due Process Clause an equality principle allowing it to invalidate segregation in the District of Columbia schools. The doctrinal obstacles to this result were formidable; however, the Court candidly admitted that "in view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the federal government."[56] The Court essentially admitted that it had no choice but to so construe Due Process in order to avoid the serious adverse consequences of being seen as hypocritical by allowing segregation to continue in its own backyard which would in turn severely undermine voluntary compliance with *Brown*. This is an instance where, as a prudential matter, the threat of adverse institutional consequences was so severe that it may have been a controlling factor.

BAD CONSEQUENCES AS STRUCTURAL PRINCIPLE

Often, the bad consequences argument is a makeweight which doesn't appear to greatly influence the decision in the case. There is one particular context in constitutional law in which this argument rises to the level of structural principle, however, and that is the policing of constitutional boundaries. This is sometimes between the state and the individual, but even more frequently in the federalism area between the national government and the states. In an area where authority is divided, the argument is frequently made that if a particular rule is adopted, the boundary will either be erased or it will at least be moved too far in one direction or the other. In this context, the bad consequences argument looms large. In the

53. *Id.* at 248. The Court expressed similar concerns in *McCleskey v. Kemp*, 481 U.S. 279, 315-17 (1987), where it concluded that a challenge to the imposition of the death penalty on the grounds that racial discrimination played an improper role must establish intent to discriminate by the particular jury rather than through statistical evidence of system-wide bias. The Court worried that reliance on statistical evidence alone might call into question a host of other decisions throughout the criminal process where disparities might exist. *Id.* Justice Brennan in dissent argued that the death penalty was readily distinguishable from other sentences and punishments. *Id.* at 340 (Brennan, J, dissenting).

54. 347 U.S. 497 (1954).

55. 347 U.S. 483 (1954).

56. *Id.* at 500.

substantive due process liberty of contract cases of the late nineteenth and early twentieth centuries, where rights of individual liberty came into conflict with the state police power, the Court often relied on potential adverse consequences as a justification for holding the constitutional line it had drawn. For instance, in *Lochner v. New York*,[57] the majority was obviously quite troubled by the consequences that might follow if the legislature were permitted to limit the hours that a baker could work. It opined that:

> A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family.[58]

The *Lochner* Court's attempt to maintain this boundary was ultimately abandoned and replaced with deference to the state legislatures after which its worst fears were indeed realized.

Perhaps no area of constitutional law has so consistently given rise to expressed concern by the Court that a failure to hold firm will result in complete collapse of a constitutionally significant boundary line as the federalism cases, especially those cases attempting to discern the limits of Congressional power under the Commerce Clause. In the seminal case of *Gibbons v. Ogden*,[59] Chief Justice Marshall recognized that the very enumeration of the power to regulate interstate commerce presumed that there must be something beyond which Congress could not reach. For nearly two centuries, the Court has struggled to define that boundary. In these cases, the fear that the inability to draw the line will result in erasing the boundary entirely has been a constant concern of the Court. As the battle over the scope of the Commerce Clause came to a head in the mid-nineteen thirties in cases such as *Carter v. Carter Coal Co.*[60] and *A.L.A. Schechter Poultry Corp. v. United States*,[61] the Court invalidated Congressional attempts to regulate wages, prices, and business practices for fear that, under the government's theories, "federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government."[62] Shortly thereafter, the Court gave up the fight

57. 198 U.S. 45 (1906).

58. *Id.* at 59. The Court continued in this vein for the better part of three pages. *See also The Civil Rights Cases,* 109 U.S. 3, 12 (1983) (permitting Congress to reach private conduct under the enforcement section of section 5 of the 14th amendment would allow Congress to effectively write a complete municipal code).

59. 22 U.S. 1, 194-95 (1824).

60. 298 U.S. 238 (1934).

61. 295 U.S. 495 (1935).

62. *Id.* at 546. The Court made a similar argument with respect to the Spending Power in *United States v. Butler*, 297 U.S. 1, 75 (1936), where it concluded that permitting the

and chose to defer to Congress and, as with *Lochner*, the consequences which the Court feared came to pass.

Within the past decade the Court has determined once again to play a role in defining the boundary of Congressional authority under the Commerce Clause. In the course of concluding in *United States v. Lopez*[63] that a federal criminal law prohibiting the carrying of a firearm in or near a school exceeded the Commerce power, the Court appeared to be heavily moved by the need for some assurance that there is some real limitation on the scope of the Commerce Clause. It noted that:

> Under the theories that the Government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where states historically have been sovereign. Thus, if we accept the government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[64]

In this context, the prospect of bad consequences has arguably become a significant structural principle. If the government is unable to offer at least some limiting principle to its commerce clause theory, then the theory is constitutionally inadequate.

CONCLUSION

The argument of bad consequences is a staple element of legal reasoning. It appears with great regularity in the Supreme Court's constitutional jurisprudence. More often than not, it is employed as an adjunct to some other form of argument. Frequently, it appears to be a minor consideration if not a makeweight. It is easily raised but often easily answered as well. The validity of the argument is often dependent upon predictions about unknowable future events which sometimes lead to dueling parades of horribles with no obvious method of resolution. This is particularly true when it is asserted that a rule or decision will cause nonjudicial actors to engage in action which will result in bad consequences. On the other hand, when it is asserted, as it often is, that a rule will result in adverse consequences because it will be difficult to apply in the future, at least it is arguable that the Court itself may be able to solve these problems through careful case-by-case adjudication. Whether that is in fact true, however, will depend on the circumstances.

Perhaps the most significant recurring instance of the bad consequences rule in constitutional law is in the context of boundary policing, especially in the area of federalism. There it is often argued that, if a

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government to regulate agricultural production through conditional contracts would result in "a total subversion of the governmental power reserved to the states." *Id.*

63. 514 U.S. 549 (1995).

64. *Id.* at 564. The Court made similar arguments in the course of invalidating a portion of The Violence Against Women Act which created a civil damage remedy for gender-based assaults in *United States v. Morrison*, 120 Sup Ct 1740 (2000). The Court reasoned that the theory underlying the Act would allow Congress to regulate any violent crime as well as any area of family law. *Id.* at 1752-53.

particular rule is not established, the crucial constitutional boundary between federal and state spheres of authority will be erased. The influence of this argument has risen and fallen and risen again in the Court's case law. There is some intuitive appeal to the argument and it would appear that to some extent, at least with respect to non-economic commerce clause legislation, it may have become a significant elemental principle. That is, if the government is unable to establish to the Court's satisfaction that there is no logical stopping place to its theory, then the law will be invalidated.